IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.

S. B. CIVIL MISC. APPEAL NO. 1978/2001

MANAGER, M/S. MAHARAJA INTERNATIONAL ELECTROLUX LTD.
v
SHRI GYAN SINGH & ANOTHER.

DATE OF JUDGMENT: 20th APRIL , 2007.

Hon'ble Mr. Justice R. S. Chauhan

Mr. R. K. Kala for the appellant.
Mr. Yogesh Kumar Sharma for the respondents.
REPORTABLE

By Court:

This appeal arises out of the orders dated 31.5.2000 and 7.6.2001 passed by the Workmen's Compensation Commissioner, Alwar. By the former order, the learned Commissioner granted a compensation of Rs. 1,19,539/- alongwith 10% interest per annum in favour of Shri Kalyan Singh – the claimant and imposed a penalty of Rs. 23,908/- upon the employer. The appellant had moved an application under Order 6 of the Workmen's Compensation Act, 1923 ("the Act" for short) and under Rule 3(d) and (e) of the Rules of 1924 seeking a review of the order dated 31.5.2000. However, by the latter order dated 7.6.2001, the said application was dismissed. Hence, this appeal before this Court.

The brief facts of the case are that the appellant-

Company deals with the manufacturing of refrigerators under the branding of 'Kelvinator". Earlier the Company was working under the name and style of Maharaja International Ltd. But subsequently, it has been registered in the name and style of Electrolux Kelvinator Ltd. Gyan Singh (henceforth to be referred to as 'the claimant' for short) claimed that he was employed by the appellant through Anil Jelly, the contractor for the purpose of painting and white-washing the factory building. On 4.2.97, while he was walking on the top of tin-shed, which was made of cement board and was old, suddenly he fell through the roof and sustained a fracture of his backbone. Initially, he was rushed to the hospital at Shahjahanpur, therefrom to the hospital at Behrod and eventually to the S.M.S. Hospital at Jaipur. Because of the accident, he became permanently disabled. At the time of the accident he was earning Rs. 2,000/- as wages and at the time of the accident he was 22 years old. Therefore, he filed a claim petition before the learned Commissioner.

In their reply the appellant has merely denied the fact that the claimant was ever employed with them. According to the appellant no accident took place within the factory premise on 4.2.1997. On the basis of the pleadings, the learned Commissioner framed four issues. In order to support his case, the claimant examined himself and one Rajpal as a witness. The appellant, on the other hand, examined three witnesses. After hearing both the sides

and after considering oral and documentary evidence, the learned Commissioner granted the compensation and imposed penalty as aforementioned.

Mr. Y.K. Sharma, the learned counsel for the claimant, has raised a preliminary objection to the maintainability of the present appeal. According to the learned counsel, the appeal is not maintainable under Section 30 of the Act unless substantial question of law are raised. However, in the present appeal a question of fact has been raised-whether the claimant is a casual employee or not ? Since this is a question of fact, the same cannot be agitated before this Court by way of an appeal.

On the other hand, Mr. R.K. Kala, learned counsel for the appellant, has vehemently argued that the issue whether a claim petition is maintainable under the Act and whether the benefit of the Act can be give to "a casual employee" is a question of law and not of fact. For, these two questions have an impact on the jurisdiction of the learned Commissioner. If the case does not come within the purview of the Act, the learned Commissioner could not have exercised the jurisdiction vested in him by the Act. Therefore, the exercise of jurisdiction would be per se perverse and ultravires.

In order to resolve this preliminary objection, it is essential to note the definition of workman as given under the Act.

Prior to 8.12.2000 i.e. prior to the impugned order dated 31.5.2000, the definition of workman was as under :-

> **2(1)(n) "workman" means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business) who is---**
>
> **(i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or**
>
> **(ia) (a) a master, seaman or other member of the crew of a ship,**
> **(b) a captain or other member of the crew of an aircraft,**
> **(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,**
>
> **(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or;**

However, by the Act 46 of 2000, the said definition was amended. The said amendment came into force on 8.12.2000 i.e. after the date of the impugned dated 31.5.2000. The present definition is as under :-

> **"2(1)(n) "workman" mean any person who is--**
>
> **(i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989) not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or**

(ia) (a) a master, seaman or other member of the crew of a ship,
(b) a captain or other member of the crew of an aircraft,
(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company, and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or;

(ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them.

Thus the words “other than a person whose employment is of casual nature and who is employed otherwise than for the purpose of employer's trade or business” have been omitted by the Amendment Act 46 of 2000 from 8.12.2000. Therefore, a workman who is either employed as “a casual labourer” or has been “employed otherwise than for the purpose of employer's trade or business”, such a workman would not fall within the definition of 'workman' prior to the amendment. In case he does not come within the said definition, then the benefit of the Act cannot be granted to him. Hence, before the learned Commissioner can exercise his jurisdiction legally and properly, it is essential that it is established

that the injured person does come within the definition of workman as it stood prior to 8.12.2000. If the injured person does not come within the said definition, then the learned Commissioner cannot exercise his jurisdiction. In case the jurisdiction were to be exercised, such an exercise of jurisdiction would patently be ultra vires and, thus, illegal. Therefore, the preliminary objection raised by the learned counsel for the respondents is unsustainable as the substantial issue raised before this Court is with regard to the exercise of jurisdiction by the learned Commissioner.

Mr. R.K. Kala has raised various contentions before this Court : firstly, the claimant was never employed by the appellant. Secondly, the claimant has initially alleged that he was employed by one Anil Jelly, but has subsequently claimed that he was engaged for the purpose of white-washing by Mr. Yogesh Saini and was working under the instructions of one Mr. Ramesh and Anil on the alleged date of the accident. Hence the claimant has changed his stand about his immediate employer. Therefore, he is an untrustworthy witness. Thirdly, that according to the claimant himself he was engaged for the purpose of white-washing on daily wages by one Anil Jelly or by Yogesh Saini or by Ramesh or any other. Thus, clearly the nature of his work was “casual” and it was “otherwise than for the purpose of the employer's trade or business”. Hence, being “a casual labourer” he did not fall within

the definition of workman as contained in Section 2(n) prior to its amendment on 8.12.2000. Since the claimant did not fall within the said definition, the learned Commissioner had no jurisdiction to hear the claim petition. Fourthly, that it was the burden imposed upon the claimant to prove the fact that he was a regular employee of the principal employer and was working for the trade or business of the employer. Since, the claimant has not discharged this burden, the learned Commissioner could not have granted any compensation in his favour and could not have imposed any penalty upon the appellant. Lastly, since the very foundation of order dated 31.5.2000 is without any legal basis, the order dated 7.6.2001 is equally unsustainable.

On the other hand, Mr. Y.K. Sharma has contended that Section 12 of the Act deals with contracting. According to the said Section where the principal employer in the course or purpose of his trade or business contracts with any other person, (contract for short) for the execution by or under the contractor of the whole or any part of the work which is ordinarily part of the trade or business of the trade, the principal shall be liable to pay any workman employed in the execution of the work in compensation. Therefore, since the claimant was hired through a contractor, the appellant is liable to pay the compensation. He has, further, claimed that the burden does not lie on the workman to prove the nature of his

employment . But the burden lies on the employer to prove that the claimant was engaged as a casual labourer.

We have heard both the learned counsels and have perused the impugned order and have perused the record which has been submitted before this Court.

According to the claimant himself he was employed in the appellant's factory for the purpose of white-washing and painting. According to his initial statement he was employed through Anil Jelly, a contractor. According to the subsequent statement he was employed through Yogesh Saini and worked under the instructions of one Ramesh and Anil. Although his shifting stand does not inspire confidence, but clearly he was not a regular employee of the appellant but was employed as a "casual labourer" through a contractor. The work of white-washing and painting is a casual job. Thus, the nature of the work was casual and not permanent. Therefore, clearly according to the definition of Section 2(n) as prevalent on the date of the passing of the award, the claimant did not fall within the said definition of 'workman'. Since he did not fall within the said definition, the case could not be heard by the learned Commissioner under the Act. Therefore, the order dated 31.5.2000 is unsustainable.

The contention of the learned counsel for the claimant

that the workman was hired through a contractor and is, therefore, liable to be paid by the principal employer cannot be accepted. For, the said section also employs the word 'workman', which would naturally refer to the definition given in Section 2(n) of the Act. Since Section 2(n) had excluded the category of “casual workers”, the claimant cannot take the benefit of Section 12 of the Act. Therefore, in the garb of Section 12, the appellant cannot be held liable to make payment of compensation to a person who does not fall within the definition of 'workman' as given under Section 2(n) of the Act.

It is, indeed, a settled position of law that a person who states the existence of the particular fact must prove by cogent evidence the existence of that fact. Therefore, the burden lies on the workman to establish the fact that he is a regular employee of the particular employer. However, in the instant case the claimant has failed to prove the said fact. According to the claimant himself he was engaged in a work of casual nature which was unconnected to the trade or business of the appellant. Before giving the benefit of the Act to a workman, the learned Commissioner was legally bound to examine the nature of the work performed by the workman. For, the definition of 'workman' contained in Section 2(n) carved out the category of 'workman' namely the casual workman from the definition of 'workman'. Hence, the learned Commissioner should have examined the evidence to see if the claimant fell within the

category carved out of the definition of 'workman' as given in Section 2(n). However, a perusal of the order dated 31.5.2000 clearly reveals that the learned Commissioner has failed to carry out this exercise while grating the compensation. Thus, the order dated 31.5.2000 suffers from non-application of mind. Hence the said order is unsustainable. Since the order dated 7.6.2001 is based on an unsustainable order, the order dated 7.6.2001 equally has no legal basis.

In the result, this appeal is allowed and the orders dated 31.5.2000 and 7.6.2001 are quashed and set aside. There shall be no order as to costs.

R.S. CHAUHAN, J.

MRG.